

COUNSEL

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BETWEEN KIHIKIHI SERVICE STATION LIMITED  
a duly incorporated company  
having its registered office at  
Te Awamutu and carrying on  
business as a Service Station

Plaintiff

A N D PATRICIA MAY MOYES of 10 Galloway  
Street, Kihikihi, Company Director

Defendant

Hearing: 26th October, 1984.

Counsel: G. W. O'Brien for Plaintiff.  
J. J. O'Shea for Defendant.

Judgment: 26th October, 1984.

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ORAL JUDGMENT OF TOMPKINS, J.

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The Plaintiff has moved for an order that until further order of the Court an interim injunction do issue against the Defendant to restrain her from either directly or indirectly carrying on or being engaged, concerned or interested in, either alone or in partnership with, or as manager, agent or servant of any other person in the business of motor spirits retailing and garage repairing within a radius of 4 kilometres of 42, Lyon Street, Kihikihi. It further seeks an order for costs.

This application for an interim injunction was filed in this Court on the 5th October, 1984. On the 3rd October, 1984, the Plaintiff had filed a writ of summons and statement of claim seeking against the Defendant a permanent injunction in the same terms. The circumstances giving rise to the application are these. By an agreement for sale and purchase of a business dated the 8th November, 1983, the Plaintiff agreed to purchase from Don Moyes Motors Ltd. the business the vendor company was

carrying on of retailer of motor spirits and operating a garage repair business at Lyon Street, Kihikihi. The written agreement evidencing the sale and purchase shows that the price for the business was \$50,000, of which the agreement specifies that \$10,000 (\$5,000 for the service station and \$5,000 for the garage) is being paid for the goodwill of the business, including the benefit of the tenancy of the said premises.

Clause 11 of the agreement reads:-

- " 11. In consideration of the purchase price the Vendor hereby agrees with the Purchaser that he will not for a period of 5 years from the date of possession either directly or indirectly carry on or be engaged concerned or interested either alone or in partnership with or as manager agent or servant of any other person in any business similar to that hereby sold within a radius of 4 kilometres from the said premises; and if the Vendor is an incorporated company it will before settlement procure William Donald Moyes and Patricia May Moyes to enter into a deed of covenant with the Purchaser to the like effect such deed of covenant to be prepared by and at the expense of the Purchaser and tendered to the Vendor or his solicitor for execution. "

It is apparent from the original of the agreement and from a draft of the agreement that has been exhibited to one of the affidavits that the covenant in restraint of trade contained in clause 11 was one that was actively discussed between the representatives of the purchaser and Mr. and Mrs. Moyes. The original suggested that the area of the covenant should be 10 kilometres from the premises - this was altered to 4 kilometres in the course of those negotiations. The Defendant and her husband were working directors and shareholders of Don Moyes Motors Ltd.

Pursuant to the agreement, on the 22nd December, 1983, there was completed an assignment of lease and a deed of covenant by the purchasers. This deed contains a covenant in restraint of trade that is, in effect, the same as that contained in the

agreement for sale and purchase. The deed of covenant is executed not only by the vendor and purchaser companies, but also inter alia by Mr. and Mrs. Moyes personally. This, of course, is in accordance with the covenant contained in the agreement for sale and purchase whereby they personally were to be bound by the covenant.

The purchase was completed and the Plaintiff company commenced operating the business on the 21st December, 1983. The Plaintiff company also owns a service station and garage business at Kihikihi only a few metres away and on the other side of Lyon Street from the business the subject matter of the sale and purchase.

In February, 1984, the Defendant approached Mr. Temple, a director of the Plaintiff, to seek his consent to her and her husband being employed at garage premises in Te Āwamutu, known as Te Awamutu Service Station. These premises were just within the 4 kilometres area covered by the covenant. The Plaintiff gave its consent.

In June, 1984, the premises upon which was situated the business that the Plaintiff had purchased from Don Moyes Motors Ltd. was destroyed by fire. In late August, 1984, Mr. Temple became aware that the Defendant had commenced employment at Owen Payne Motors Ltd., a service station and garage business located at 50 Lyon Street, Kihikihi. It is directly across the road from the premises the subject matter of the agreement for sale and purchase. The Plaintiff's solicitors initially wrote to the Defendant's employer on the 4th September, 1984, requiring Owen Payne Motors Ltd. to confirm that the Defendant had ceased her employment with that company. It received no such assurance. A further approach also yielded no positive result. These proceedings were then commenced.

It was submitted on behalf of the Plaintiff that it had established that there was a serious question to be tried in its action based on an allegation that the Defendant was in breach of the covenant in restraint of trade to which I have referred. This contention was not challenged by the Defendant. She acknowledges that she, in taking employment with Owen Payne Motors Ltd., is in breach of the covenant. Further, there has been no statement of defence to the writ of summons and statement of claim filed by the Plaintiff, nor has there been any other application seeking orders to vary the covenant in restraint of trade pursuant to the relevant provisions of the Illegal Contracts Act, 1970. Hence, there can be no question but that the Plaintiff has established a serious question to be tried. Then in accordance with the principles now well established, as set out in the decision of the Privy Council in Eng Mee Young v. Letchumanan (1980) A.C. 331, it is necessary to apply the guiding principle in considering whether to grant an interlocutory injunction, namely, where lies the balance of convenience.

It was submitted on behalf of the Plaintiff that the actions of the Defendant in breaching her contractual obligation is one that puts at risk the goodwill of the business the Plaintiff had purchased. In that context I should refer to a further fact, namely, that before the fire destroyed the premises the Plaintiff had decided to cease retailing motor spirits from the premises of the business it had bought. It appears that the reason for this is that the Plaintiff anticipated that it would be able to obtain at least the greater portion of that business at the premises at which it was already carrying on its business in Kihikihi. So the Plaintiff claims that it still has a significant interest in the goodwill of the business that it purchased in that it is endeavouring to ensure that that goodwill is reflected in benefit to its other business.

Further, in support of its submission that the balance of convenience justifies the making of the order sought, the Plaintiff points to the acknowledged fact that the Defendant is in a precarious financial position and in the event of damages for breach being ultimately established may well not be able to pay. By way of contrast, the Plaintiff submits that its undertaking is sound and that it therefore has the ability to pay any damages. Further, it is submitted that in the event of the interim injunction being refused there would be considerable difficulty in assessing the damages the Plaintiff would suffer as a result of the Defendant's breach.

For the Defendant it is acknowledged, as I have indicated, that the Defendant is in breach of her covenant, but Mr. O'Shea urges that despite the existence of a serious question to be tried there remains a residuary discretion on the Court whether or not to grant an interim injunction, and in considering the exercise of that discretion the Court should take into account special factors which operate against the Court making the order sought.

A number of matters were raised. First, Mr. O'Shea submitted that the Plaintiff was itself in breach of the instrument by way of security that it gave to Don Moyes Motors Ltd. to secure \$10,000 of the purchase price. I do not propose to comment further on this assertion since in my view it has not been established.

Next it is submitted that the Defendant's employment does not damage the Plaintiff. The only possible loss could be in petrol sales and the evidence, it is submitted, does not establish that this has occurred.

Thirdly, and most importantly, is the consequence of

the making of an order on the Defendant. She would lose her employment. She and her husband face severe financial difficulties as a result of the liquidation of Don Moyes Motors Ltd. and the threatened enforcement by the Westpac Banking Corporation of rights against Mr. and Mrs. Moyes arising out of their guarantee and their company's liability to the bank.

Finally, Mr. O'Shea refers to the conduct of the Plaintiff. Mr. Temple is facing a charge of arson arising out of the destruction by fire of the premises from which the purchased business has been carried on. It is acknowledged that the initial approach on behalf of the Plaintiff for the Defendant to cease her employment with Owen Payne Motors Ltd. was made early in September, but Mr. O'Shea points to the fact that on the 26th September, the same day that Mrs. Moyes was summonsed by the police to attend the court in Te Awamutu for the taking of depositions in relation to the arson charge, she was later approached by Mr. Temple and his solicitor in relation to her employment. It is submitted that approaching the Defendant in that manner was an act of impropriety on behalf of Mr. Temple which should affect the exercise of the Court's discretion on the present application. Further, Mr. O'Shea indicated to the Court that the Defendant was prepared to undertake not to work in the forecourt of her employer's garage, nor to solicit any customers from the business sold to the Plaintiff. She further undertook to resign if her employer publicised the fact of her employment.

It is therefore in these circumstances that the Court is required to decide whether or not it should exercise its discretion to grant the order sought.

I have decided that the order should be made. There can be no doubt, and indeed the Defendant freely acknowledges, that in taking employment with her present employer she is

breaching the contractual obligation she entered into when she and her husband, through their company, sold the business to the Plaintiff. Therefore not only is there a serious case to be tried but at least on the present state of the action it is a case that is bound to succeed. In my view the facts raised by the Defendant cannot, at least in the absence of an application under the Illegal Contracts Act to vary or cancel a covenant, affect the exercise of the Court's discretion at this stage. It is, of course, correct that the making of even an interim order will result in the Defendant losing her employment, but I have no reason to doubt that she entered into that employment either with knowledge that it was in breach of the covenant or carelessly, not being concerned about it. This seems all the more so when, with regard to her earlier employment in Te Awamutu itself, she sought the Plaintiff's consent. She voluntarily gave up that employment because she said the nature of the work and the hours did not suit her personal circumstances, and took instead employment across the road from the premises where the business purchased by the Plaintiff had been carried on. In my view, in those circumstances the balance of convenience strongly favours the grant of the order sought.

Hence there will be an order in the terms sought. In accordance with the normal practice on interim injunctions I do not propose to make any order as to costs. That is an issue that should be determined when the action for a permanent injunction is heard.

Solicitors:

Bennetts, Morrison & O'Brien, Te Awamutu, for Plaintiff.

Judd, Brown, Kay, Page & O'Shea, Te Awamutu, for Defendant.